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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANGEL BARRAZA, Defendant and Appellant.	B283526 (Los Angeles County Super. Ct. No. KA019275)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed and remanded with directions.

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Jose Angel Barraza of voluntary manslaughter and found true the allegation he used a firearm. The trial court sentenced Barraza to the upper term of 11 years, plus five years (also the upper term) for the firearm enhancement. Barraza argues the trial court abused its discretion in excluding some of the evidence of specific instances of the victim's violent conduct and sustaining an objection during counsel for Barraza's closing argument. Barraza also contends the trial court violated his constitutional rights under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] in imposing the upper term on his manslaughter conviction and violated the statutory prohibition on using the same factors to impose the upper term and the firearm enhancement. We affirm the conviction but remand for resentencing on the firearm enhancement to allow the trial court to exercise discretion whether to strike the enhancement.

FACTUAL AND PROCEDURAL HISTORY

A. *Barraza Kills Delgado and Flees to Mexico*

One Saturday evening in September 1993 Roberto Delgado (Delgado) and his cousin, Braulio Delgado (Braulio), attended a party on the porch of a garage in the back of a residence in El Monte, California. There were approximately 50 people at the party. At some point the two men left the party to check on Delgado's truck. As they walked on the driveway to the street, they saw Barraza and Pedro Valdez Herrera approach the driveway on the way to the party. Barraza and the Delgados had known each other since they were teenagers living in La Soledad, a small rural village in Durango, Mexico.

After the Delgados walked past Barraza and Herrera, the two pairs of men turned around and faced each other. According to Herrera, Barraza and Delgado did not exchange any words or punches, although Herrera also said he heard Delgado speak to Barraza in Spanish and say something like, "What's up asshole?" Barraza testified Delgado said, "Why are you coming, you son of a bitch?" or "Why did you come, son of a bitch."

Braulio thought Barraza and Delgado were going to fight. Braulio said to his cousin, "Not right now." According to Barraza, Braulio held Barraza from behind while Delgado hit him, but Barraza was able to get away from Braulio and take out a gun to defend himself.[1] When Herrera saw Barraza lift up his shirt and pull a gun from his waistband, Herrera stood in front of Barraza and said, "No, no." Barraza reached around Herrera and fired shots at Delgado. According to Braulio, Barraza shot Delgado several times from less than 20 feet away.

Delgado fell to the ground, and Braulio bent over to look at him. Braulio asked Delgado where he had been shot, but Delgado was unable to speak. Braulio saw Delgado had been shot in the neck. Braulio ran into the house and told someone to call the police and an ambulance.

Delgado died from two gunshot wounds to the chest. Investigators recovered four .45 caliber casings from the crime scene. Barraza fled to Mexico. Delgado's funeral was two weeks later in Durango. Delgado's teenage daughter saw Barraza at the funeral, and she told the police she had seen him there. In January 2015 Barraza was detained crossing the Texas border from Mexico into the United States.

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[1] Barraza testified he brought a .45-caliber handgun with him to the party because he always carries it.

B. *The People Charge Barraza with Murder, the Jury Convicts Him of Voluntary Manslaughter, and the Trial Court Sentences Him to 16 Years in Prison*

The People charged Barraza with murder and alleged he personally used a firearm within the meaning of Penal Code section 12022.5.[2] The jury found Barraza not guilty of murder but guilty of the lesser included offense of voluntary manslaughter. The jury also found true the allegation Barraza personally used a firearm. The trial court sentenced Barraza to the upper term of 11 years, plus the upper term of five years for the firearm enhancement under section 12022.5, for a total prison term of 16 years. Barraza timely appealed.

DISCUSSION

A. *The Trial Court Did Not Err by Excluding Some but Not All the Evidence of Delgado's Violent Conduct*

1. *Applicable Law and Standard of Review*

Evidence Code section 1101, subdivision (a), provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1103 provides an exception: In a "criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code] Section 1101 if the

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[2] Undesignated statutory references are to the Penal Code.

evidence is . . . [o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (See *People v. Fuiava* (2012) 53 Cal.4th 622, 695; *People v. Myers* (2007) 148 Cal.App.4th 546, 552.) We review for abuse of discretion a trial court's rulings on the admission or exclusion of evidence under Evidence Code sections 1101 and 1103. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114; *People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

2. *None of the Trial Court's Rulings Was an Abuse of Discretion*

a. Evidence Delgado Had Guns

Barraza argues the trial court erred by excluding testimony by Barraza and Herrera about the number of times they saw Delgado with a gun. The jurors heard Barraza testify he had seen Delgado with a gun on two different occasions, and they heard Herrera testify he had seen Delgado with a gun. The trial court sustained objections to questions asking Barraza and Herrara how many times they had seen Delgado with a gun. Neither ruling was an abuse of discretion.

The prosecutor objected to counsel for Barraza's questions, and Barraza's answers, about whether Delgado always carried a gun:

"Q: On direct examination, you had talked about two instances when you saw a gun. Was that actually the same incident or were they two distinctly different instances?

"A: Different.

"Q: And were those the only two times that you recall?

"A: Well, he was always carrying a gun.

"Q How do you know that?"

The prosecutor objected and moved to strike Barraza's statement that Delgado always carried a gun. The court sustained the objection and granted the motion to strike, but stated to counsel for Barraza, "So why don't you ask a more specific question." Counsel for Barraza then asked, "You had stated that he always carried a gun. Did you always see one?" The court sustained the prosecutor's objection to that question, stating that "at this time there is no evidence to support that question," but said to counsel for Barraza, "So start over again, please." Counsel for Barraza said, "I'll just move on."

The trial court's rulings were proper. The problem with the questions was counsel for Barraza's use of the word "always." Barraza did not have personal knowledge to testify Delgado always carried a gun. Indeed, Barraza testified that he did not live with Delgado, did not know him well, and did not remember how many times he saw Delgado with a gun. While Barraza may have been able to answer the question about whether Delgado had a gun every time Barraza saw him, the court asked counsel for Barraza to start the question again, and counsel stated she was going to move on to another topic. There was no abuse of discretion by the trial court in this exchange.

As for Herrera, counsel for Barraza asked him, "Had you ever seen [Delgado] with a gun before," and Herrera answered, "Yes. He had many guns." The trial court sustained the prosecutor's objection and granted his motion to strike, although it is unclear from the record whether the objection was to the entire answer or just the last four words, "He had many guns." The court subsequently stated, "Ever having a gun is a bit vague. If there's a specific instance of conduct that you are thinking of that would tend to show [Delgado] had a . . . character trait for violence, that's one thing. Again, I don't know whether or not his character for violence is going to be an issue in this case, because

I don't know what the defense is going to be. And absent any understanding of what your defense is going to be, I'm not sure that it's relevant." The court also stated, "So it may or may not be relevant, but I don't see it coming in for this witness [Herrera] absent some better foundation, okay?" The context suggests the trial court was appropriately proceeding cautiously until it had a better sense of the issues and evidence in the case. The court did not foreclose inquiry into whether Delgado had a lot of guns, but only ruled Barraza would need to call a witness who had more knowledge of Delgado's gun ownership than Herrera. There was no abuse of discretion.

b. Evidence Delgado Shot a Gun Outside Barraza's House

Counsel for Barraza sought to introduce evidence Delgado had fired shots outside Barraza's house on one or more occasions, including in June 1993, several months before Barraza killed Delgado. The trial court excluded the evidence on several grounds, including lack of foundation and relevance. Counsel for Barraza sought first to elicit testimony from Herrera about an incident where Delgado fired a gun outside Barraza's house, but counsel did not know if Herrera was present at the incident. Counsel for Barraza stated: "I want to say he was there, but I don't know that for a fact. And with that, I'm being honest with the court. . . ." Counsel for Barraza also did not know if Barraza ever went outside to see if Delgado was there.

"The Court: So your offer of proof is based on information that was obtained from witnesses other than Mr. Herrera, right?

"[Counsel for Barraza]: Yes.

"The Court: Okay. So if that becomes something that can be connected to September 4th, 1993, you've got witnesses who can do that other than Mr. Herrera, correct?

"[Counsel for Barraza]: Correct.

"The Court: So it seems to me unless you know for a fact, (a) that he [Herrera] was there, (b) that Mr. Barraza was there, and (c) that there was some connection between Mr. Delgado's conduct that night and a threat to Mr. Barraza, I don't see its relevance. And I especially don't see it with respect to this witness.

". . . .

"[Counsel for Barraza]: Understood."

Again, there was no abuse of discretion. Counsel for Barraza conceded she did not know if Herrera had personal knowledge of the shooting incident (but other witnesses did), the court ruled Herrera could not testify about the incident (but other witnesses might be able to), and counsel for Barraza appeared to accept the court's ruling ("understood"). (See Evid. Code, § 702 ["the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"]; *People v. Lewis* (2001) 26 Cal.4th 334, 356 ["[t]o testify, a witness must have personal knowledge of the subject of the testimony, i.e., 'a present recollection of an impression derived from the exercise of the witness' own senses'"]; *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1150 ["[t]o testify, a witness must have personal knowledge of the subject of the testimony, based on the capacity to perceive and recollect"].) The trial court did not abuse its discretion in accepting counsel for Barraza's representations and allowing Barraza to present witnesses who, unlike Herrera and Barraza, witnessed the alleged shooting incident.

Counsel for Barraza also indicated she "had intended to call an officer as well as the dispatcher from" the date of the shooting incident outside Barraza's home. Counsel represented that officers had stopped a car near Barraza's house with four people in it, but that the police reports indicated the officers did not find

a firearm. The court questioned "how that demonstrates anything about the victim in this case" and stated "so far there's nothing connecting the victim with any violent conduct." Counsel for Barraza, however, never called the officers, and the court never ruled they could not testify. The court and counsel then discussed two other witnesses, including Barraza's sister, who counsel for Barraza claimed had witnessed incidents involving Delgado in front of Barraza's house. Barraza never called his sister to testify.[3]

The trial court stated that, at this point in the trial, there was not enough evidence of self-defense or unreasonable self-defense to admit the evidence of incidents outside Barraza's house. The court stated: "This is only relevant if it goes to some sort of self-defense or imperfect self-defense. You can't just muddy up the victim for the sake of muddying up the victim. It has to be relevant. And whether or not he had some sort of character trait, it still has be relevant to an issue in this case. And the only issue in this case that it could potentially be relevant to is a defense. And the only relevance it could have to a defense is if it were in your client's mind . . . or something [Barraza] observed. So far we haven't got any testimony that Mr. Delgado was aggressive toward your client that night. So there was something about possibly some words, but that was it. And so unless there's evidence that your client had a state of mind or your client had a belief, it's completely irrelevant." The court added: "And I'm not prepared to let you put in all—first of all, you haven't spoken to the person [Barraza's sister]. Second of all,

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[3] Counsel for Barraza stated that she left several "very detailed" messages with members of the Barraza family, but that they had not returned her calls. She also stated she told the officers "they're more than likely not coming in" to testify.

you don't know if she's going to be here. Third of all, I'm not going to let you put in evidence muddying up the victim until I have some better assurance as to what the offer of proof is when [Barraza] will testify. Because if he does not testify, then it's not coming in. And while I understand that . . . evidence can some in in different order, in this instance, absent any evidence concerning the victim's behavior that might [be] aggressive, I'm not inclined to let you put on these other witnesses before Mr. Barraza testifies."

The record shows the trial court did not categorically exclude evidence of incidents at Barraza's house, but only ruled it was not appropriate to admit such evidence at the time. Indeed, the trial court stated that, under appropriate circumstances, the evidence would admissible: "So the first thing that has to be determined before anything is decided about these witnesses is, is [Barraza] going to testify. And if so, ultimately, what he says. And if his testimony is such that it makes this incident . . . relevant, then I had indicated yesterday that I would allow you to put it in, assuming it's tied to the victim. And we don't know yet whether it will be. So it's a little premature to decide that, in my opinion." The court's comments show that the court did not rule the evidence was not admissible; the court ruled the evidence was not admissible *yet*.

And that ruling was not an abuse of discretion. Because the court had not yet heard any evidence Delgado acted violently the evening Barraza shot him, the court could not determine whether the proffered evidence proved Delgado acted "in conformity with" that character or trait. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 828 ["[w]here no evidence is presented that the victim posed a threat to the defendant, exclusion of evidence regarding the victim's propensity for violence is proper"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 912-913 ["in order for a murder

victim's propensity for violence to be relevant, there must be some evidentiary support for a self-defense-type theory that the defendant perceived the murder victim as presenting an immediate threat," and "even if the murder victim were the most violent person in the world, that fact would not be relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head"], overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643; *People v. Yokum* (1956) 145 Cal.App.2d 245, 260 ["[t]estimony that decedent had made prior threats against defendant is admissible if there is evidence tending to show any act of aggression committed by decedent at the time of the homicide indicating that he intended to attack defendant"]; cf. *People v. Lamar* (1906) 148 Cal. 564, 576 ["when there is evidence in a case tending to support the claim of a defendant that he acted upon an honest apprehension of imminent peril from some overt act on the part of the deceased, and the circumstances of the fatal contest are equivocal, the reputation of the deceased as a violent and dangerous man is proper and competent evidence to present to the jury for consideration in determining whether defendant acted upon a reasonable apprehension that he was in imminent peril"].) The court acted well within its discretion in waiting until it heard evidence that Delgado acted violently the night of the shooting before admitting evidence Delgado had been violent before that night. (See *People v. Buenrostro* (2018) 6 Cal.5th 367, 403 ["the order of proof is generally within the court's discretion"]; *People v. Case* (2018) 5 Cal.5th 1, 46 ["'[t]he order of proof rests largely in the sound discretion of the trial court'"].)

c. Evidence Delgado Was Arrested for Driving Under the Influence and Had Killed a Co-worker

Counsel for Barraza stated she intended to call three officers to testify about an incident where Barraza was arrested for driving under the influence and resisted arrest. The trial court sustained the prosecutor's objection under Evidence Code section 352. The court ruled that there was no evidence "to this point" Delgado was inebriated or belligerent the night of the shooting and that "it's so far afield from the issues in this case that under [Evidence Code section] 352 it would not be admitted."

Under Evidence Code section 352, "'[t]he trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value.'" (*People v. Anderson* (2018) 5 Cal.5th 372, 402; see *People v. Duff* (2014) 58 Cal.4th 527, 558 ["we afford trial courts wide discretion in assessing whether in a given case a particular piece of evidence is relevant and whether it is more prejudicial than probative"].) Even if evidence is admissible under Evidence Code section 1103, the trial court has discretion to exclude it under Evidence Code section 352. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 700; *People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.) Barraza, however, does not argue the trial court abused its discretion under Evidence Code section 352.

Finally, at one point while Barraza was testifying, he stated: "I am hiding something here in my chest, but I am going to say it now in front of all these people. These people killed a guy who was . . . working with his mother." When the trial court granted the prosecutor's motion to strike, counsel for Barraza argued, "He's explaining why he had fear." The court asked for

an offer of proof, and the following exchange occurred outside the presence of the jury:

"[Counsel for Barraza]: It was that he had information with regards to the death of one of his coworkers at the hands of [Delgado]. And that . . . that was where the rift came and the threats, was because they were afraid that he was going to go and rat them out.

"The Court: How did he come about this information?

"[Counsel for Barraza]: It's the only thing I've never been able to get because I just found this out.

". . . .

"The Court: What is he going to say to lay a foundation that he got this information?

"[Counsel for Barraza]: Because it's so new to me, I don't have that. And I can ask him further, not on the witness stand, but right now I can move on to something else.

"The Court: You move on to something else . . . ."

Counsel for Barraza admittedly was unable to explain whether and how Barraza knew Delgado had killed a coworker. There is no indication in the record counsel for Barraza ever learned how Barraza knew Delgado allegedly killed someone, and counsel did not raise the issue again. The trial court did not abuse its discretion in excluding such inflammatory evidence until counsel could make a proper offer of proof and could establish Barraza had personal knowledge Delgado had killed someone. (See *People v. Brophy* (1954) 122 Cal.App.2d 638, 648 ["'where a proper foundation has been laid, it is conclusively established in almost all jurisdictions that evidence of the turbulent and dangerous character of the victim of an assault or homicide is admissible'"].)

3. *Any Error Was Harmless*

Even if the trial court had abused its discretion by excluding some of the evidence of Delgado's prior acts of violence, any error was harmless. The jury heard abundant evidence Delgado drank alcohol, was violent, and frequently threatened Barraza. For example, Herrera testified that, prior to the shooting, Delgado had threatened Barraza many times. Herrera also stated Delgado became "very violent" when he drank and he "would always fight" with Barraza, both verbally and physically.

Barraza testified he was afraid of Delgado because Delgado "had beaten [him] up several times," and Barraza described several such incidents. On one occasion, a few months before the 1993 shooting, as Barraza was getting out of a car, Delgado approached and said in Spanish, "What's happening" and "Here you are, son of bitch." On another occasion, Delgado used a semiautomatic handgun to knock out Barraza's teeth, which required Barraza to wear dentures. On another occasion, Delgado hit Barraza with the butt of a gun on his forehead, leaving a scar. On yet another occasion, Barraza was walking by Delgado's house, and Delgado threatened him and said, "What's up? What do you have?" Barraza understood this as a challenge and a threat. On still another occasion, Delgado was stopped at a traffic light, saw Barraza, and again said, "What's up?"

Barraza also testified Delgado "was a very aggressive person" who "would humiliate you." Barraza stated Delgado would make faces at him, and say, "Come on." Barraza said that Delgado challenged him to a fight "many times" and that Delgado came to Barraza's house several times, made threatening gestures, and said, "What? What?" Barraza testified he was afraid of Delgado and his cousin because of all the times they had beaten him.

Thus, the jury heard evidence providing a full and graphic description of Delgado and how he acted toward Barraza, yet the jury convicted Barraza of manslaughter. There is no reasonable probability that, had the jury heard the relatively few additional instances of Delgado acting violently that the trial court excluded, the jury would have reached a different result. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 131 [erroneous exclusion of evidence is harmless if "there is no reasonable probability the jury would have reached a more favorable verdict"].)

B. *The Trial Court's Error in Sustaining an Objection to Counsel for Barraza's Closing Argument Was Harmless*

As counsel for Barraza concluded her closing argument, she stated: "Now, I don't have a chance to respond to what [the prosecutor is] going to say [in his rebuttal argument] when we come back from lunch. So I ask of you to challenge what it is that he says in your mind. And think, well, what would [counsel for Barraza] say if she had the opportunity to get up here and—" The prosecutor interrupted and stated: "She's asking them to advocate, and I object to that." The trial court sustained the objection. Counsel for Barraza continued: "Keep that open mind. Challenge and think of what it is that he is saying."

Barraza correctly argues "[t]here was nothing objectionable about defense counsel's request of the jury." Counsel for Barraza was not asking the jury to advocate; she was asking the jury to think, which was entirely appropriate. The court's error in sustaining the objection, however, was harmless. After the court sustained the objection, counsel for Barraza argued without objection that the jurors should think about and challenge what

the prosecutor would say in his rebuttal argument, which was not materially different from the comment the court sustained the objection to (but did not tell the jury to disregard). And the trial court instructed the jurors their role was "to be an impartial judge of the facts, not to act as an advocate for one side or the other," an instruction we presume the jurors understood and followed. (*People v. Buenrostro*, *supra*, 6 Cal.5th at p. 431.) There is no reasonable probability that, had the trial court overruled the objection, Barraza would have obtained a more favorable verdict. (See *People v. Harris* (2013) 57 Cal.4th 804, 853 [applying harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 to the trial court's error in sustaining an objection to defense counsel's argument].)

Barraza also contends "the judge's ruling essentially precluded the jury from challenging what they [*sic*] heard during the prosecution's rebuttal" and "weakened the reasonable doubt standard, depriving [Barraza] of his Fifth, Sixth, and Fourteenth Amendment rights to due process, fair trial, and jury trial." Hardly. The trial court did not give the jury any instruction, let alone one that shifted the burden of proof from the prosecution, nor did the trial court strike counsel for Barraza's comment. Contrary to Barraza's assertion, "the trial court's sustaining the objection" did not tell "the jury that using this kind of reasoning would be improper." Indeed, immediately after the trial court sustained the objection, counsel for Barraza encouraged the jurors to use that very kind of reasoning.

C. *The Matter Must Be Remanded for Resentencing*

At sentencing, the court stated: "In this matter, the jury having found [Barraza] guilty of voluntary manslaughter as a

lesser offense of the charged murder, the sentencing range at the time in 1993 was three, six, or 11 years. The [firearm] use allegation that was found true pursuant to . . . section 12022.5 provided then for a sentencing [range] of three, four, or five years." The court first discounted the mitigating factors of provocation (because there was no evidence Delgado provoked Barraza the night of the shooting) and lack of a criminal record (because Barraza had been in Mexico for 23 years). Turning to aggravating factors, the court stated Barraza brought a gun to the party, used the gun to shoot Delgado "at close range," planned the crime because he armed himself with a gun, and fled because of the "repercussions" of what he had done. The court stated that "there's no real justification in this matter for anything other than [the upper] term of 11 years" on the voluntary manslaughter conviction.

In 1993, when Barraza committed his crime, California's Determinate Sentencing Law (DSL) "specified that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' [Citation.] The facts relevant to this sentencing choice are to be determined by the court and need be proved only by a preponderance of the evidence. [Citations.] 'The court shall set forth on the record the facts and reasons for imposing the upper or lower term.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 836, fns. omitted.) The sentencing law at the time directed "'the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense,'" which meant that, for Sixth Amendment purposes, the middle term was the

maximum term that could be imposed based on the jury's verdict. (*Ibid*.)

In 2007 the United States Supreme Court in *Cunningham v. California*, *supra*, 549 U.S. at page 281 held the DSL violated "a defendant's constitutional right to a jury trial to the extent it authorize[d] the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence." (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1513.) In response to *Cunningham*, the Legislature amended the DSL to give trial courts "the discretion under section 1170, subdivision (b), to select among the lower, middle, and upper terms specified by statute without stating ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. [Citation.] Rather, 'a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.' [Citation.] In other words, these amendments to the DSL essentially eliminated the middle term as the statutory maximum absent aggravating factors." (*People v. Jones* (2009) 178 Cal.App.4th 853, 866.)

According to Barraza, the trial court here "applied California's [DSL] as it existed in 1993 (when [Barraza] committed the crime)" and violated his rights under *Cunningham* and *Sandoval* by imposing the upper term based on facts the jury did not find. But that's not what happened. The trial court stated it was applying the "sentencing range" the DSL provided in 1993, not the now-unconstitutional sentencing procedure as it existed in 1993. There would be no point in applying a 1993 sentencing law that was declared unconstitutional in 2007. The

trial court applied the current, constitutional sentencing law in imposing the upper term, using only the three-six-11-year sentencing triad section 193 prescribed then (and still prescribes). And, as the People point out, even if the trial court applied the former DSL in imposing the upper term, a remand would be unnecessary. The Supreme Court has held that the remedy for such a violation is a remand to allow the trial court to exercise its "broad discretion" to select among "the three terms specified by statute for the offense, subject to the requirements that the court consider the aggravating and mitigating circumstances as set out in statutes and rules and that reasons be stated for the choice of sentence." (*People v. Sandoval*, *supra*, 41 Cal.4th at pp. 843, 846.) Because the trial court here already considered those circumstances and stated its reasons for imposing the upper term, a remand would produce the same result. (See *id.* at p. 850 ["in practical terms, the difference between the pre-*Cunningham* provision of the DSL enacted by the Legislature and a statutory scheme in which the trial court has broad discretion to select among the three available terms is not substantial," and it "seems likely that in all but the rarest of cases the level of discretion afforded the trial court under" the current version of the DSL "would lead to the same sentence as that which would have been imposed under the DSL as initially enacted"].)

The trial court also imposed the upper term of five years on the firearm enhancement. The court stated: "With respect to the firearm use allegation, I think the same factors in aggravation apply. I know I can't use them . . . repeatedly, but there are many, and I think that the fact that the firearm was used at close range for no apparent reason in my mind justifies [the upper]

term for that also." Barraza argues that section 1170, subdivision (b), "prohibited the court from imposing an upper term by using the fact of any enhancement upon which the sentence is imposed under section 12022.5 (among others)." (See *People v. Jenkins* (1995) 10 Cal.4th 234, 252, fn. 10 [section 1170, subdivision (b), prohibits the "dual use" of a fact to impose the upper term and to impose an enhancement].)

Whether the trial court erred in imposing the upper term and the enhancement based on the same facts is a closer question. Although section 1170 prohibits a court from using the same fact to impose both the upper term and an enhancement (*People v. Scott* (1994) 9 Cal.4th 331, 350), a court may use the same fact to impose the upper term for the offense and the upper term of the enhancement. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1336 ["'the dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited'"]; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1198 [same].) "'Only a single aggravating factor is necessary to make it lawful for the trial court to impose' the upper term." (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1182; accord, *People v. Jones*, *supra*, 178 Cal.App.4th at p. 863; see *People v. Osband* (1996) 13 Cal.4th 622, 732 ["one aggravating factor suffices to impose upper term"]; *People v. Weber* (2013) 217 Cal.App.4th 1041, 1064 ["[a] single aggravating factor will support an upper term sentence"].) The same rule applies to an enhancement. (See *People v. Yim* (2007) 152 Cal.App.4th 366, 369 ["[a] single aggravating factor may support a sentencing choice"].)

Here, the trial court imposed both the upper term for the manslaughter conviction and an enhancement under section 12022.5 for the true finding on the firearm use allegation.

Several of the factors the court stated for imposing the upper term on the manslaughter conviction involved firearm use: He had a gun at the party, and he used the gun at the party. One of the other circumstances mentioned by the trial court, that Barraza fled because he was scared, is not generally an aggravating circumstance under rule 4.421 of the California Rules of Court. The final circumstance, that the crime "involved some planning," is a factor that could justify the upper term without violating the dual use prohibition (see Cal.Rules of Court, rule 4.421(a)(8)), but the court stated the reason Barraza's crime involved planning was that he brought and used a gun. To be sure, planning in advance to shoot someone with a firearm is not the same as using a firearm, but using those circumstances to impose the upper term for manslaughter and the firearm enhancement is pretty close to the dual use line. This is particularly true in light of the court's comment that the "same" aggravating factors that supported the court's choice of the upper term for the manslaughter conviction supported imposition of the firearm enhancement.

We do not have to decide the issue in this appeal. At the time the trial court sentenced Barraza in 2017, section 12022.5, subdivision (c), prohibited the court from striking the firearm enhancements under that statute. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127.) The Legislature, however, has since amended section 12022.5, subdivision (c), to give the trial court discretion to strike a firearm enhancement in the interest of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 1.) Barraza argues, the People do not dispute, and we agree that section 12022.5, subdivision (c), as amended, applies to Barraza.

(See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

The People argue the record shows the trial court would not have exercised discretion to strike the firearm enhancement under section 12022.5, even if it had the discretion to do so because the court stated there was no justification for anything other than the upper term and the court "did not grant [Barraza] any leniency in sentencing" him. However, assuming the trial court properly imposed the upper term for the manslaughter conviction and the firearm enhancement, the court did not clearly indicate it would have imposed the enhancement even if it had the discretion not to impose it. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"]; cf. *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, fn. 3 [remand was appropriate under amendments to section 667, subdivision (a), where "[t]he record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant"].) Moreover, at the time the court sentenced Barraza, the court "was not aware of the full scope of the discretion it now has under the amended statute," and defendants ""'are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court.'"" (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

Therefore, it is appropriate in this case to remand the matter for resentencing to allow the trial court to exercise its discretion under the amended statute. If the court strikes the

firearm enhancement, the dual use issue will be moot. If the court does not strike the firearm enhancement, the court will have an opportunity to clarify the reasons for its sentencing choices.

DISPOSITION

The judgment of conviction is affirmed. This matter is remanded for resentencing to allow the trial court to exercise its discretion whether to strike or impose the firearm enhancement under section 12022.5.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.